TABLE OF CONTENTS

CITATIONS TO OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 7

APPENDIX A – OPINION OF THE NEW MEXICO COURT OF APPEALS A1

APPENDIX B – WRIT OF CERTIORARI OF THE NEW MEXICO SUPREME COURT A9

APPENDIX C – ORDER OF THE NEW MEXICO SUPREME COURT A10

APPENDIX D – FINAL ORDER OF THE NEW MEXICO COURT OF APPEALS A11

APPENDIX E – TREATY A12

TABLE OF AUTHORITIES

Cases

Kahn v. Arizona State Tax Commission, 16 Az.App. 17, 490 P.2d 846, dismissed for want of a substantial federal question, 411 U.S. 941 (1973) 5

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) 2, 3, 4, 5, 6

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 5

Norton Co. v. Department of Revenue, 340 U.S. 534, 537 (1951) 7

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 5

Statutes

28 U.S.C. Sec. 1257(3). 2

Treaty Between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 (1868). . . 2, 3, 4, 6

Sec. 72-13-38, N.M.S.A. 1953 (1973 Supp.). 2

Sec. 72-13-39, N.M.S.A. 1953 (1973 Supp.). 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No._____

MARY JO FOX,
Respondent,

vs.

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

The Bureau of Revenue, State of New Mexico, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New Mexico entered in the case on January 15, 1975, which judgment, after the Supreme Court of the State of New Mexico quashed a Writ of Certiorari to the Court of Appeals of New Mexico on August 27, 1975, became final by entry of a Final Order on September 3, 1975.

CITATIONS TO OPINION BELOW

The opinion of the New Mexico Court of Appeals, printed in the attached Appendix A, is reported in 87 N.M. 261 and 531 P.2d 1234 (Ct.App. 1975).

JURISDICTION

The New Mexico Court of Appeals rendered judgment on direct appeal under the New Mexico Tax Administration Act, Sec. 72-13-39, N.M.S.A. 1953 (1973 Supp.) on January 15, 1975. The Bureau of Revenue petitioned the Supreme Court of the State of New Mexico for a writ of certiorari which was granted (Appendix B) and then on August 27, 1975 quashed (Appendix C). The New Mexico Court of Appeals then entered its Final Order (Appendix D) on September 3, 1975, making final its judgment of January 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Is the State of New Mexico, after *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), deprived of jurisdiction to tax the income of a non-Navajo Indian living on the Navajo Reservation and deriving her income from employment with the Bureau of Indian Affairs?

STATUTE INVOLVED

Involved in this appeal is the Treaty of June 1, 1868, between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667 (1868). It, minus marginal notes, is printed in the attached Appendix E.

STATEMENT OF THE CASE

Mrs. Mary Jo Fox filed a claim for refund of her income taxes with the Bureau of Revenue, State of New Mexico, pursuant to Sec. 72-13-38, N.M.S.A. 1953 (1973 Supp.). At the administrative hearing below she claimed that her income was exempt because she is an Indian living and working on an Indian Reservation. For the taxable years in question she and her husband filed joint New Mexico personal income tax returns.

Tr. 2-4. She is an enrolled member of the Comanche Indian Tribe of Oklahoma, married to a non-Indian. Tr. 2-3. She is not a member of the Navajo Tribe. Tr. 2. Mrs. Fox has an interest, as a Comanche, in allotted lands of the Tribe in Oklahoma. Tr. Testimony* 31. She and her husband reside on the Navajo Reservation at Shiprock, New Mexico, where she works on the Reservation for the Bureau of Indian Affairs as a home economics teacher. Tr. Testimony 18-19. The income of her husband earned from employment by Navajo Community College on the Reservation, Tr. Testimony 20, was conceded to be taxable. Tr. 3, Tr. Testimony 26.

On the basis of these facts, the Commissioner of Revenue denied the claim for refund, and Mrs. Fox appealed the decision and order to the New Mexico Court of Appeals.

The Court of Appeals, in a 2-1 decision, reversed the decision and order, holding that Mrs. Fox's income was exempt from state taxation on authority of *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973). The Chief Judge of the Court dissented because he felt that, reading *McClanahan* together with the Navajo Treaty of 1868, the State of New Mexico retained the power to tax non-Navajo Indians.

The Supreme Court of New Mexico granted the Bureau's petition for a writ of certiorari to review the Court of Appeals' decision but subsequently quashed the writ. The Court of Appeals then entered a final order reversing the administrative decision. It is this order which the Bureau of Revenue asks this Court to review.

---

* The transcript of testimony given at the administrative hearing was not part of the stipulated record on appeal before the New Mexico Court of Appeals, since the Court of Appeals denied the Bureau's motion to have it made a part thereof. But facts set out in the transcript of testimony were cited by the Bureau to the Court of Appeals and the New Mexico Supreme Court under Rule 8(d), New Mexico Appellate Rules, which provides: "The fact that parts of the record are not included in the transcript shall not prevent the parties or the appellate court from relying on such parts." With or without this transcript of testimony, the question presented is significant enough for this Court to examine at length.

REASONS FOR GRANTING THE WRIT

The question of the states' jurisdiction over Indians, Indian activities and non-Indian activities on reservations is of great concern to those western states, including New Mexico, that have a relatively large number of Indian citizens and large areas of Indian lands. It is of great import, of course, to Indians themselves. State taxation of Indians, with which we are concerned in this case, is but one aspect of this unsettled area of the law. What law there is in the area is almost entirely fashioned by the judiciary. Consequently, the judiciary determines in large measure the states' policies with respect to taxation of Indians and in a real economic sense whether the states will be forced to subsidize individual Indians. Hence this case, although not important measured by the amount of tax involved, is worthy of this Court's attention. It is yet another facet of the question: How far does the jurisdiction of the states reach as to taxation of Indians?

The problem begins with the ambiguity in the *McClanahan* opinion. There this Court, relying in part on the Navajo Treaty of 1868, held that Arizona had no jurisdiction to tax the income of a *Navajo* residing on the Navajo Reservation whose income was derived from Reservation sources. The Court carefully confined its ruling by its repeated use of the term "reservation Indian" as a synonym for Navajo Indian and by the following language:

> "It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. *We are not here dealing with Indians who have left* or never inhabited *reservations set aside for their exclusive use* or who do not possess the usual accouterments of tribal self-government." 411 U.S. at 167-68. [Emphasis added.]

The Court also said, after taking note of the erosion of the Indian sovereignty doctrine, that:

> ". . . the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, *e.g.*, Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943)." 411 U.S. at 171.

Thus, the question presented by this case, namely, whether the income of an Indian, not Navajo, living on the Navajo Reservation and working for a federal agency is exempt from taxation, is unresolved.

Yet at the same time as *McClanahan* was decided, this Court handed down its opinion in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). *Mescalero* seems to conflict with *McClanahan*, for it emphatically rejected the notion that the states have no jurisdiction at all over Indian tribes. Taking note of *McClanahan*, this Court very carefully said that Justice Frankfurter's opinion in the *Kake Village* case was still intact:

> "The upshot has been the repeated statements of this Court to the effect that *even on reservations state laws may be applied* unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. Organized Village of Kake, *supra*, at 75, 82 S.Ct. at 570; Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); New York ex rel Ray v. Martin, 326 U.S. 496, 499, 66 S.Ct. 307, 308, 90 L.Ed. 261 (1946); Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896)." 411 U.S. at 148. [Emphasis added.]

Thus, we submit that unless New Mexico's tax would interfere with tribal self-government or unless Congress has taken away New Mexico's jurisdiction to tax in this case, it retains that jurisdiction. As for Congressional action, we find no evidence that Congress has taken away New Mexico's jurisdiction here. As for the self-government argument, we submit there is no such interference. The artificiality of the Court of Appeals' decision in this case is suggested by the following: the taxpayer's husband, also not a Navajo, lives and works on the reservation. His income is concededly taxable. *Kahn v. Arizona State Tax*

Commission, 16 Az.App. 17, 490 P.2d 846, dismissed for want of a substantial federal question, 411 U.S. 941 (1973). How does this state's income tax interfere with Navajo self-government when the taxpayer's income is taxed, yet not interfere with Navajo self-government when her husband's income is taxed?

The chief source of exemption in *McClanahan* was the Navajo Treaty of 1868, 15 Stat. 667 (1868). Since this case also involves the Navajo Reservation, we look to that Treaty to determine the taxpayer's status in this case. Her status, evident from the Treaty, is nothing more than that of a government employee. In *McClanahan* the Court stated:

> "The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside 'for the use and occupation of the Navajo tribe of Indians [, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them;]' and that 'no persons except those herein authorized to do, and except such officers, soldiers, agents, and *employees of the government,* or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.' " 15 Stat. 667, 668 (1868).
>
> * * *
>
> ". . . this Court . . . [has] adopt[ed] the general rule that 'Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and faith.' Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L. Ed. 478 (1930). When this canon of construction is taken together with the tradition of Indian independence described above, *it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajo and the exclusion of non-Navajos from the*

> *prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision."* 411 U.S. at 173-75. [Emphasis added.]

Mrs. Mary Jo Fox, an employee of the Bureau of Indian Affairs, owes her right to reside on Navajo lands to the treaty language quoted above authorizing *employees of the government* to remain on the reservation. She does not derive that right from the treaty provision authorizing the presence on the reservation of Indians whom the Navajo Tribe choses "to admit among them," for no evidence of any such nexus between her and the Navajo Tribe has been shown. Since "[t]he general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption," *Norton Co. v. Department of Revenue,* 340 U.S. 534, 537 (1951), Mrs. Fox derives no benefit from the Navajo Treaty. The Navajo Reservation, as Justice Marshall pointed out, was created for Navajos. They have not chosen to confer any treaty benefits on Mrs. Fox, and there is no reason for the courts to feel they need to do so on behalf of the Tribe.

CONCLUSION

We respectfully request that certiorari be granted to review the significant question presented by this case.

TONEY ANAYA
Attorney General of New Mexico

JAN UNNA
Special Assistant Attorney General

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

MARY JO FOX,
Appellant,

v. NO. 1514

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO
Appellee.

DIRECT APPEAL

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Window Rock, Arizona
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Attorneys for Appellee

OPINION

HENDLEY, JUDGE.

Taxpayer is a member of the Comanche Tribe of Indians of Oklahoma and is not an enrolled member of the Navajo Tribe. At all times material hereto, she resided on and worked only on the Navajo Reservation in New Mexico. All income received by taxpayer for the years 1969 through 1972 was a result of employment on the Navajo Reservation in New Mexico. Taxpayer's husband is a non-Indian and it is conceded that his income is taxable. Taxpayer filed a claim for refund of state income tax withheld for the years 1969 through 1972. The Bureau denied the claim for refund and taxpayer appeals. We reverse.

The sole question on this appeal, under the above facts, is whether the taxpayer is exempt from state income tax. A comparison of the facts in the instant case and of those in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) reveals that the only significant difference is that McClanahan was a Navajo Indian working on the Navajo Reservation in Arizona, and taxpayer here is a Comanche Indian working on the Navajo Reservation in New Mexico. The common facts of both cases, however, is the coalescence of status (Indian) and situs (Reservation). *McClanahan* stated:

> ". . . that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources." [Emphasis added.]

See *O'Cheskey v. Hunt*, 85 N.M. 388, 512 P.2d 961 (1973).

The issue is thus narrowed to whether the fact that taxpayer is a Comanche Indian destroys her status as a "reservation Indian" and makes her liable for state income tax.

We have neither found or been directed to a single case where it was regarded crucial that the Indian in question, although located on a reservation, was not a member of the tribe to which the reservation belonged. In the few cases thus far decided, tribal affiliation was held to be of no importance as long as there was the coalescence of the two facts – status of Indian and situs on a reservation.

We review the cases not because we deem them controlling as precedent, but rather because they provide the guidance necessary to decide the instant case. As will be seen, most are in the areas of either civil or criminal jurisdiction. However, we add that the jurisdiction or lack thereof of the State of New Mexico over the person of taxpayer does not dispose of the case. Notions of jurisdiction are relevant only insofar as they lend aid

in determining our question of whether taxpayer is an Indian protected from state income taxation by the *McClanahan* holding.

Taxpayer's status as an Indian and her situs on a reservation makes her a reservation Indian for purposes of exclusive federal court jurisdiction over serious crimes. The Supreme Court in discussion 18 U.S.C. Sec. 1153 (the Major Crimes Act) defined its scope in the following terms:

> "The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe." United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1009, 30 L.Ed. 228 (1885).

See also *United States v. Burland*, 411 F.2d 1199 (9th Cir. 1971), cert. denied, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971), where it was held that a federal court had exclusive jurisdiction over an Indian belonging to a tribe that had ceded jurisdiction to the state under 25 U.S.C. Sec. 1322(a) because his alleged crime was committed on a reservation that had not so ceded jurisdiction, and *Cook v. State*, ____S.D.____, 215 N.W.2d 832 (1974), where it was held that state courts lacked jurisdiction to convict an Indian belonging to a California tribe who allegedly committed a crime on a South Dakota reservation.

Taxpayer's status as an Indian and her situs on a reservation makes her a reservation Indian for purposes of jurisdiction to extradite. In *Arizona ex rel Merril v. Turtle*, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed. 2d 494 (1970) it was held that Arizona did not have jurisdiction to grant extradition of a Cheyenne Indian from Oklahoma living on the Navajo Reservation.

The New Mexico cases of *Valdez v. Johnson*, 68 N.M. 476, 362 P.2d 1004 (1961) and *State v. Begay*, 63 N.M. 409, 320 P.2d 1017 (1958) point in the same direction with regard to jurisdiction over civil actions and misdemeanors. In *Valdez* our

Supreme Court upheld the trial court which had ruled that, ". . . no [state] jurisdiction exists to try a civil dispute between two Indians living at the same Pueblo and arising out of an alleged civil wrong occurring at the Pueblo." The opinion recited that both plaintiff and defendant were residents of the Isleta Pueblo; but significantly, we think, it made no mention of tribal affiliation. Although the *Begay* case recited that Begay was a Navajo and that the incident occurred on the Navajo Reservation, the *Valdez* court, in citing to *Begay*, stated that it had there held that, ". . . the State did not have jurisdiction over an Indian driving an automobile on a portion of the highway in the Navajo Reservation." Again, there was no mention of tribal affiliation, status as Indian and situs on a reservation having been shown. See also, *State Securities, Inc. v. Anderson*, 84 N.M. 629, 506 P.2d 786 (1973) for a result contra with respect to jurisdiction, but yet supporting the general proposition that tribal affiliation is unimportant in determining the status of reservation Indian.

We have been apprised of three out-of-state cases directly in point and one analogous case dealing with an excise tax. Without exception, it was held that tribal affiliation is of no moment when determining the taxability by states of an Indian on a reservation. *White Eagle v. Dorgen*, 209 N.W.2d 621 (N.D. 1973); *Boxer v. State*, (Dist. Ct. Roosevelt Co. Montana, March 22, 1974); In the Matter of Appeal of William A. Mehojah, Sr., (Ida. Bd. Tax App. No. 73-I-27, 1974); *Confederated Salish and Kootenai Tribes v. Moe*, ____F. Supp.____(U.S.D.C. Montana, Missoula Div., Civil No. 2145 decided May 10, 1974).

We consider the foregoing in light of the fact that Indians qua Indians are often singled out for particular and special treatment. *Morton v. Mancari*, ____U.S.____, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) and cases cited therein; see also 25 U.S.C. Sec. 13 (special welfare benefits), 42 C.F.R. Sec. 36.12(a)(2) (special health care benefits), and 25 U.S.C. Sec. 452 (special educational assistance). In view of the United States' "solemn commitment toward the Indians," *Morton v. Mancari*, supra, it is our opinion that taxpayer's status is that of

"reservation Indian" within the meaning of the *McClanahan* case. The fact of the coalescence of status and situs announced in *McClanahan* is controlling. Any holding in *Ghahate v. Bureau of Revenue,* 80 N.M. 98, 451 P.2d 1002 (Ct.App. 1969) which is contrary to this opinion is expressly overruled.

We do not view this case as being within the "assimilated in the general community" doctrine as described in *McClanahan.* See *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832). The Bureau would have us view this case as being one where the Indian in question left or never inhabitated a reservation set aside for her own use. Although we are not left with a clear meaning of the term, we believe that "general community" certainly means something more than other Indians' reservations.

Reversed and Remanded.

IT IS SO ORDERED.

/s/ William R. Hendley
JUDGE

I CONCUR:

/s/ Lewis Sutin, J.

JOE W. WOOD, C.J., (Dissenting).

WOOD, Chief Judge (Dissenting)

The facts in this case are sparse and, in my opinion, insufficient to show that Mary Jo Fox was entitled to a refund of state income tax. Mary Jo Fox is a Comanche residing and working on the Navajo Reservation at Shiprock, New Mexico. She is married to a non-Indian. She and her husband filed joint income tax returns and Mary Jo claims a refund for the tax years 1969 through 1972. These facts are some indication that she had become assimilated into the general community, *McClanahan*, supra, and thus has the tax status of a non-Indian. See *Kahn v. Arizona State Tax Commission*, 16 Ariz. App. 17, 490 P.2d 846 (1971); appeal dismissed, 411 U.S. 941, 36 L.Ed.2d 404, 93 S.Ct. 1917 (1973). Claiming a refund, Mary Jo Fox had the burden of showing she was entitled to the refund. See *United Veterans Org. v. New Mexico Prop. App. Dept.*, 84 N.M. 114, 500 P.2d 199 (Ct.App. 1972); *Kaiser Steel Corp. v. Property Appraisal Dept.*, 83 N.M. 251, 490 P.2d 968 (Ct.App. 1971). The Bureau did not have the burden of showing she was assimilated; it was Mary Jo's burden to show she was not assimilated. She failed to do so.

Mary Jo Fox ignores these indications of assimilation. She presents her appeal on the basis that three facts show that New Mexico has no jurisdiction to tax her income, and that she is entitled to the refunds as a matter of law. Those facts are that she is an Indian, she resides on an Indian reservation, and her income is earned within the reservation. The authority said to require this result is *McClanahan*, supra.

Language used in *McClanahan*, supra, supports this view. *McClanahan*, supra, states:

> "But it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend. . .
>
> . . . .
>
> "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the

> applicable treaties and statutes which define the limits of state power. . . .
>
> "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. . . .
>
> . . . .
>
> ". . . [T]he reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law – including state tax law – to Indians on the Navajo Reservation."

If the above-quoted language, with its emphasis on territorial sovereignty, means that New Mexico law does not cross the reservation line, then *McClanahan,* supra, poses the problem of whether any Indian residing within the Navajo Reservation, Navajo or non-Navajo, is a resident of New Mexico entitled to vote or to hold public office in New Mexico. N.M. Const., Art VII, Secs. 1 and 2. If territorial sovereignty is the key to New Mexico jurisdiction in matters involving Indians, *Montoya v. Bolack,* 70 N.M. 196, 372 P.2d 387 (1962), should be reconsidered.

McClanahan, supra, may fairly be read in a different light. It may be read to mean only that New Mexico may not tax the income of a Navajo living on the Navajo Reservation if the income is derived from employment within the Reservation. *McClanahan,* supra, may be read as holding that New Mexico's tax jurisdiction is barred because of the provisions of the treaty with the Navajos. If the expansive language of *McClanahan,* supra, is read in the light of the facts in that case, the references to "Indians" means "Navajos," and the reference to "reservation Indians" means Navajos or other Indians admitted by the Navajos with the consent of the United States as provided by Article II of the Treaty with Navajo Indians. 15 Stat. 667 (1868).

My view is that *McClanahan*, supra, applies to Navajos and other Indians admitted by the Navajos to use and occupy Navajo Reservation lands. The stipulated record shows that Mary Jo Fox is not a Navajo. The stipulated record does not show that the Navajos have admitted her to the use and occupancy of their Reservation. *McClanahan*, supra, in my view, does not bar New Mexico's jurisdiction to tax her income earned on the Navajo Reservation.

The majority holding otherwise, I dissent.

/s/ Joe W. Wood
Chief Judge

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO,
Petitioner,
vs.
MARY JO FOX, Respondent.

WRIT OF CERTIORARI

STATE OF NEW MEXICO :
IN THE SUPREME COURT :

TO: COURT OF APPEALS OF THE STATE OF NEW MEXICO

WHEREAS, the Petitioner, through its attorneys Toney Anaya, Attorney General, and Jan E. Unna, Assistant Attorney General, Santa Fe, New Mexico, did apply to this Court on February 12, 1975 for its review of the decision handed down by the Court of Appeals on January 15, 1975 entitled Mary Jo Fox vs. Bureau of Revenue of the State of New Mexico, in Cause No. 1514; and

WHEREAS, the Supreme Court did on February 12, 1975, give notice to the Court of Appeals in compliance with Rule 28(f) of the Rules Governing Original Proceedings in the Supreme Court, that an application for writ of certiorari directed to the Court of Appeals had been filed in the above styled and numbered cause of action.

WHEREAS, a copy of the application for writ of certiorari has been served on Respondent in the above styled and numbered cause of action.

NOW, THEREFORE, the writ of certiorari is hereby issued and the Court of Appeals is hereby ordered to proceed no further in Cause No. 1514 pending the further order of this Court.

WITNESS, The Honorable John B. McManus, Jr., Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 20th day of February, 1975.

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Wednesday, August 27, 1975

NO. 10354

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,
Petitioner,

vs.

MARY JO FOX, Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court on its own motion, and the Court being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the writ of certiorari heretofore issued in the above entitled cause on February 20, 1975, be and the same is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that this cause be and the same is hereby remanded to the Court of Appeals for final disposition of this matter.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 1514 be and the same is hereby returned to the Clerk of the Court of Appeals.

APPENDIX D

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

Wednesday, September 3, 1975

NO. 1514

MARY JO FOX,
Appellant,

vs.

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,
Appellee.

ADMINISTRATIVE APPEAL

FINAL ORDER

This cause having heretofore been submitted and taken under advisement and a decision of the Court having been handed down on the 15th day of January, 1975.

IT IS, THEREFORE, ORDERED, That the order of the Court entered herein on the 15th day of January, 1975, reversing the judgment of the Commissioner of Revenue, be and the same is hereby made final.

APPENDIX E

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS:
Concluded June 1, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:—

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part; and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:—

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or

individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected,

certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an

English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian – each Indian being encouraged to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and

necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article_____of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and

sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l. Indian Peace Commissioner

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GANADO MUCHO	his x mark.

Council.

RIQUO	his x mark.
JUAN MARTIN	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO.	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

TABLE OF CONTENTS

QUESTION PRESENTED. 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

CONCLUSION. 10

APPENDIX. 11

TABLE OF AUTHORITIES

Cases

Davis v. United States, 32 F.2d 935 (9th Cir. 1974). 5

DeCoteau v. District County Court, 420 U.S. 425 (1975). 9

Kahn v. Arizona Tax Comm'n, 16 Ariz. App. 17, 490 P.2d 846, appeal dismissed, 411 U.S. 941 . . 9

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (197[illegible]). 2,8,9

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). 8

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938) 5

Seymour v. Superintendent, 368 U.S. 351 (1962) 8

United States v. Burland, 441 F.2d 1199 (9th Cir. 1971). . . 8

United States v. Ives, 504 F.2d 935 (9th Cir. 1974). 5

United States v. Kagama, 118 U.S. 375 (1885). 5

United States v. McGowan, 302 U.S. 536 (1938). 5

United States v. Rogers, 45 U.S. (4 How.) 567 (1846). 4

United States v. Thomas, 151 U.S. 577 (1894). 5

Westmoreland v. United States, 155 U.S. 545 (1895). 5

Williams v. United States, 327 U.S. 711 (1946). 9

Statutes

25 C.F.R. Part 11 5

25 C.F.R. § 11.1(e) 6

25 C.F.R. § 11.2(c) 2,6,11

7 Nav.Tr.C. § 133. 7

17 Nav.Tr.C. 7

Public Law 83-280 2

1 Stat. 137 (1790) 4

15 Stat. 667 (1868) 6

36 Stat. 557 (1910) 2

4 U.S.C. §§ 105-110. 2

18 U.S.C. § 1151. 8

25 U.S.C. §§ 1321-1326. 2

Other

L. Kelly, The Navajo Tribe and Federal Indian Policy 1900-1935 (U. Ariz. Press 1968). . . . 7

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-769

BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO,

Petitioner,

v.

MARY JO FOX

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Mary Jo Fox opposes the granting of certiorari in this case for the reasons set out below.

QUESTION PRESENTED

In respondent's view, the question presented is whether the State of New Mexico has jurisdiction to tax the income of a non-Navajo Indian residing and working in Navajo Indian country.

STATUTES INVOLVED

In McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973), this Court relied on several Acts of Congress as well as the Navajo Treaty of 1868, and respondent contends these statutes to have equal application to this case. These statutes are the Arizona and New Mexico Enabling Acts, 36 Stat. 557 (1910);*/ Public Law 83-280, as amended, 25 U.S.C. §§ 1321-1326; and the Buck Act, 4 U.S.C. §§ 105-110. Of additional importance to this case is a regulation of the Interior Department, 25 C.F.R. § 11.2(c), which is set out as an appendix to this brief.

STATEMENT OF THE CASE

Petitioner's statement is accurate but includes many facts irrelevant to

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*/ The Arizona Enabling Act involved in McClanahan is identical to New Mexico's and the two were promulgated together by Congress; see the reference cited.

the legal issue presented by the petition. In respondent's view, the only relevant facts are that she belongs to an American Indian Tribe and at the times in question resided and worked within the boundaries of the Navajo Indian Reservation.

REASONS FOR DENYING THE WRIT

Respondent agrees that many questions as to the jurisdictional status of Indians are of great national importance and that the instant case is very important to her and other Indians similarly situated. However, the particular question presented here is not of great national importance. The number of Indians residing on reservations owned by other tribes is a very small percentage of the reservation Indian population of the United States.

A second reason to deny the writ is

that the court below was correct in its decision.

Since the first Indian Intercourse Act of 1790, 1 Stat. 137, Congress has repeatedly legislated with respect to "Indians", thus requiring the courts to define that term, often with jurisdictional consequences. The courts, state and federal, have consistently defined the term to include all Indians without differentiation according to tribal membership. Indeed, the very concept of formal, written enrollment in an Indian tribe is an alien one imposed on the tribes long after the basic principles of Indian law were established by Congress and this Court.

Several decisions of this Court have application to the problem; all support the decision of the court below. United States v. Rogers, 45 U.S. (4 How.) 567,

572-3 (1846); United States v. Kagama, 118 U.S. 375, 383 (1885); United States v. Thomas, 151 U.S. 577, 585 (1894); Westmoreland v. United States, 155 U.S. 545 (1895); United States v. McGowan, 302 U.S. 535 (1938).

Lower federal court and state court decisions are consistent. Several of the more important cases are cited by the court below. In addition see Ex parte Pero, 99 F.2d 28 (7th Cir. 1938); United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974); Davis v. United States, 32 F.2d 860 (9th Cir. 1929).

Administrative practices of the Bureau of Indian Affairs (BIA) are also consistent with the decision below. In 1935, the BIA promulgated basic law and order regulations now codified as 25 C.F.R. part 11. These regulations are to serve Indian reservations whose tribal

legal machinery is inadequate. They were in effect on the Navajo Reservation from 1935 until 1959, when tribal law supplanted them pursuant to 25 C.F.R. § 11.1(e). The section relevant to this case is 25 C.F.R. § 11.2(c), which defines the scope of federal authority on an Indian reservation to include members of tribes other than those owning the reservation.

Furthermore, as the court below noted, BIA benefits are furnished to all Indians on reservations without regard to tribal membership. Petition for Certiorari, pages A4-A5.

The Navajo Treaty of 1868, 15 Stat. 667, also supports the decision below, since the Treaty established the Reservation for "the Navajo Tribe of Indians, and for such other friendly tribes or individual Indians as from time to time

they may be willing, with the consent of the United States, to admit among them; . . ." Treaty Article II. Petitioner's contention that formal action of the Navajo Tribe is needed to invoke this provision is questionable, since there was no unified Navajo tribal government in 1868; the tribe was then a group of independent bands imprisoned by the United States at the Bosque Redondo. The Navajo tribal government dates only from the 1920's. L. Kelly, The Navajo Tribe and Federal Indian Policy 1900-1935 (U. Ariz. Press 1968). But in any event, the Navajo Tribe today does assert its governmental authority over all Indians on the reservation. 7 Nav.Tr.C. § 133; 17 Nav.Tr.C. passim.

The dissenting opinion below and petitioner in this Court appear to urge a personal approach to jurisdiction. It

is suggested that the decision on state jurisdiction should depend on such individualized facts as whether respondent is culturally assimilated into Anglo-American society, who her employer is, and who her husband is. Such an approach is manifestly impractical (cf., Seymour v. Superintendent, 368 U.S. 351, 358 (1962)); but in any event, the Indian jurisdiction is clearly territorial, not personal. United States v. Burland, 441 F.2d 1199 (9th Cir. 1971), cert. denied, 404 U.S. 842; compare McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) with Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). The basic federal statute defining Indian country, 18 U.S.C. § 1151, describes a territory. While this statute applies directly to criminal jurisdiction, this Court has recently interpreted it to apply to other

jurisdictional relationships as well. DeCoteau v. District County Court, 420 U.S. 425, fn.2 (1975).

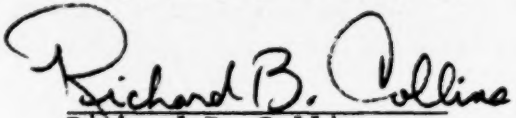
Location within Indian country territory has jurisdictional consequences for non-Indians as well as Indians. Williams v. United States, 327 U.S. 711 (1946). But for many purposes, non-Indians in Indian country have been treated differently from Indians. Compare McClanahan v. Arizona Tax Comm'n, supra, with Kahn v. Arizona Tax Comm'n, 16 Ariz. App. 17, 490 P.2d 846, appeal dismissed, 411 U.S. 941. As the authorities discussed earlier make clear, this distinction in law has consistently been between non-Indians and all Indians regardless of tribe, for which reason the decision below was correct.

CONCLUSION

For the reasons stated, this Court should deny the petition for certiorari.

January , 1976.

Respectfully submitted,



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APPENDIX

25 C.F.R. § 11.2(c) For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, . . .